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*IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Date of Decision 21.11.2008*

+ **C.R.P. No. 764/2003**

THE ORIENTAL INSURANCE CO. LTD.
..... Appellant
Through: Mr. Pankaj Seth, Advocate.

versus

SMT. USHA GOEL & ORS. ..... Respondent
Through: Mr. S.K. Pruthi with Mr. Manoj Ahuja, Advocates.

+ M.A.C. APPEAL No. 489/2005

THE ORIENTAL INSURANCE CO. LTD.
..... Appellant
Through: Mr. Pankaj Seth, Advocate.

versus

SMT. USHA GOEL & ORS. ... Respondent
Through: Mr. S.K. Pruthi with Mr. Manoj Ahuja, Advocates.

+ M.A.C. APPEAL No. 535-39/2005

SMT. USHA GOEL & ORS.
……Appellants
Through: Mr. S.K. Pruthi with Mr. Manoj Ahuja, Advocates.

versus

THE ORIENTAL INSURANCE CO. LTD. & ORS
……Respondents
Through: Mr. Pankaj Seth, Advocate.

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether judgment should be reported in Digest?

: **PRADEEP NANDRAJOG, J. (Oral)**

R.P. No. 397/2007 in C.R.P. No. 764/2003

1. The Civil Revision Petition was filed by the Oriental Insurance Company in the year 2003 raising a challenge to an order dated 23.04.2003 dismissing the application filed by the company under Section 170 of the M.V. Act, 1988, inter alia, alleging that neither the owner nor the driver of the offending vehicle had appeared to contest the proceedings evidenced by the fact that none had bothered to enter appearance before the Learned Judge MACT, and that from such conduct, the Insurance Company apprehends a probable collusion between the claimants and the owner/driver. It was thus prayed that the Insurance Company may be permitted to contest the claim petition on the grounds which in law are available to the owner of the vehicle.

2. The said application was dismissed by the learned Tribunal vide impugned order dated 23.04.2003.

3. The contention urged by the Insurance Company in the

Civil Revision Petition is that Section 170 of the M.V. Act, 1988 has two components. Clause (a) is the first component and Clause (b) is the second component. It was urged that both Clauses are independent of each other and if it is shown that the owner/driver has failed to contest the claim, the Insurance Company can seek a right to be granted the opportunity to urge grounds that are available to the owner/driver of the offending vehicle as per the mandate of Clause (b). The reason why the Insurance Company had to so urge is the fact that vide order dated 23.04.2003, the Learned Judge, MACT has read Clause (a) and (b) of Section 170 as conjunctive and not disjunctive i.e. has held that the element of collusion has to be read in Clause (b) as well.

4. The Civil Revision Petition had come up for final hearing on 25.01.2007. The same was allowed with a finding that the Insurance Company had a right to take over the defence available to the owner of the vehicle by virtue of Section 170 (b) of the M.V. Act, 1988. It may be noted that none had appeared for the claimants on 25.1.2007.

5. Seeking review of the order dated 25.1.2007 disposing of the Civil Revision Petition, it is pointed out that since the Insurance Company failed to obtain a stay of proceedings before the Learned Judge, MACT during the pendency of the Revision Petition, proceedings continued, resulting in an

award being passed in favour of the claimants.

6. It may be noted that against the award, the Insurance Company has filed MAC Appeal No. 489/2005. The claimants are also aggrieved by the award evidence by the fact that they have filed MAC Appeal No. 535-39/2005.

7. In respect of the plea urged in the Review Petition that the Civil Revision Petition was rendered infructuous when the award was published by the Tribunal suffice it would be to state that where an order which affects a vital substantive right of a party at a trial is questioned in a revision or an appeal, merely because no stay is granted in the appeal or revisional proceedings and in the meanwhile the main proceedings before the Lower Court/Tribunal is concluded, does not render infructuous the challenge to the said order.

8. Be that as it may, said aspect of the matter need not bother me, for the reason the decision of the Hon'ble Supreme Court reported as 2002 (6) SCALE 569 *National Insurance Company Vs. Nicolletta Rohtagi & Ors.* held as under, in Para 31:-

> "31. We have already held that unless the conditions precedent specified in Section 170 of 1988 Act is satisfied, an insurance company has no right of appeal to challenge the award on merits. However, in a situation where there is a collusion between the claimants and the insured or the insured does not contest the claim and, further, the tribunal does not implead the insurance company to contest the claim in such cases it

> is open to an insurer to seek permission of the tribunal to contest the claim on the ground available to the insured or to a person against whom a claim has been made. If permission is granted and the insurer is allowed to contest the claim on merits in that case it is open to the insurer to file an appeal against an award on merits, if aggrieved. In any case where an application for permission is erroneously rejected the insurer can challenge only that part of the order while filing appeal on grounds specified in sub-sections (2) of Section 149 of 1988 Act. But such application for permission has to be bonafide and filed at the stage when the insured is required to lead his evidence. So far as obtaining compensation by fraud by the claimant is concerned, it is no longer res integra that fraud vitiates the entire proceeding and in such cases it is open to an insurer to apply to the Tribunal for rectification of award."

10. Thus, the Insurance Company can challenge the rejection of the application under Section 170 of the M.V.Act 1988 even in the appeal filed against the main award.

11. I, therefore, need not deal with the issue whether the Civil Revision Petition was maintainable or the question whether if held not to be maintainable, can the same be converted into a petition under Article 227 of the Constitution of India.

12. My reason for so holding is that the Insurance Company has filed a substantive appeal against the final award and in the same has questioned the legality of the order dated 23.4.2003. The said appeal is MAC Appeal No.489/2005. Needless to state, as per the decision in *Nicolletta Rohtagi's*

case (supra) the said order can be challenged in the appeal filed against the final award.

13. On the merits of the order passed by the Tribunal rejecting the application filed by the Insurance Company under Section 170 of the M.V. Act, 1988, I may note that apart from the order under review, the consistent view taken by this Court evidence by the decision reported as 134 (2006) DLT 340 *National Insurance Company Ltd. Vs. Ramesh Kumar & Anr.* is that Clause (a) and (b) of Section 170 are disjunctive and in the alternate and thus the facet of collusion which is an integral part of Clause (a) is not a facet of Clause (b).

14. It is not in dispute that in the instant case neither the owner nor the driver contested the claim petition and hence on the question of the offending vehicle being driven rashly or negligently or for that matter being involved in the accident itself, a defence available to the owner and the driver was entitled to be taken over by the insurance company by virtue of Clause (b) of Section 170 of the M.V.Act 1988. The consequence has to be that the Review Petition has to be dismissed. Both appeals i.e. the appeal filed by the Insurance Company as well as by the claimants have to be disposed of by setting-aside the impugned award dated 21.04.2005 and proceedings restored before the Tribunal with a direction that

the claim petition shall be decided in accordance with law commencing from the stage where the application of the Insurance Company under Section 170 of the M.V. Act, 1988 was dismissed. The said application is allowed. The Insurance Company is permitted to contest the claim on the grounds that are available to the owner of the vehicle.

15. I note that 50% of the awarded amount has been deposited by the appellant with the Learned Judge, MACT as per interim orders passed by this Court in MAC Appeal No.489/2005. 10% thereof has been released in favour of the claimants, subject to furnishing a security.

16. Since the award has been set-aside, consequential directions pertaining to the said deposit have to be passed. I direct that 40% of the awarded amount which has been retained by the Learned Judge, MACT, together with the accrued interest thereon be returned to the Insurance Company. 10% amount released to the claimants is permitted to be retained by the claimants, subject to keeping alive the security afresh till the decision by the Tribunal. Needless to state, if the claim fails the said amount would be refunded and if the claim succeeds and equals to or exceeds the amount received by the claimants the same shall be adjusted against the fresh award and the security shall stand released.

17. Parties are directed to appear before the Learned Judge, MACT (Successor Court) on 15.12.2008. The Learned Judge, MACT is requested to fast track the proceedings since the matter has been remanded. Every attempt would be made to decide the matter afresh within three months reckoned with effect from 1.1.2009.

18. No costs.

19. TCR be returned forthwith.

PRADEEP NANDRAJOG, J.

NOVEMBER 21, 2008
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